SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8601

WARNER PRESS, INC.

Petitioner,

-vs-

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INDIANAPOLIS PRINTING PRESSMEN, ASSISTANTS AND OFFSET WORKERS UNION NUMBER 17,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Warner Press, Inc., prays that a Petition of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter called "Seventh Circuit") enforcing an order of the National Labor Relations Board (hereinafter called "Board") against the Petitioner.

CITATIONS TO OPINIONS BELOW.

The opinion of the Seventh Circuit (printed in Appendix A hereto, *infra*, pp. 1a to 12a) is reported at ____ F.2d ____. The form of judgment proposed by the Board to the Court appears in Appendix B hereto *infra*, pp. 13a to 14a. Petitioner has opposed such proposed form of judgment. As of the date on which this Petition was submitted for printing, the Court had not entered judgment in this case. The decision and order of the Board (R-91-101)[1] are reported at 215 N.L.R.B. No. 10. (1974).

JURISDICTION.

The decision of the Seventh Circuit Court of Appeals was entered on October 31, 1975. This Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 62 *Stat.* 928 (28 U.S.C. Section 1254(1) and under 61 *Stat.* 136, as amended (29 U.S.C. Section 160(e)).

QUESTION PRESENTED.

Did the Petitioner violate Section 8(a)(5) of the National Labor Relations Act (61 *Stat.* 136, as amended, 29 U.S.C. Section 158(a)(5)) by refusing to bargain with a union which misrepresented its own constitution and by-laws regarding the payment of initiation fees and the levying of fines to Petitioner's employees immediately before a Board conducted election?

FEDERAL STATUTES INVOLVED.

The primary statutory provisions involved are:

(1) Section 7, Section 8(a)(5) and Section 9(c)(1) of the National Labor Relations Act, 61 *Stat.* 136, as amended (29 U.S.C. Sections 157, 158(a)(5) and 159(c)(1)). The above provisions of the National Labor Relations Act appear in Appendix C, *infra*, pp. 15a to 16a.

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[1] "R" refers to the certified record of the United States Court of Appeals for the Seventh Circuit.

(2) Sections 201 and 209 of the Labor Management Reporting and Disclosure Act of 1959, 73 *Stat.* 519 (29 U.S.C. Sections 431 and 439). The above provisions of the Labor Management Reporting and Disclosure Act of 1959 appear in Appendix D, *infra*, pp. 17a to 20a.

STATEMENT OF CASE.

Basis of Federal Jurisdiction—The Jurisdiction of the Seventh Circuit was invoked to review an order of the Board issued pursuant to the National Labor Relations Act (hereinafter called "Act").

Facts of Case—The Union[2] filed a petition with the Board on December 17, 1973, for a representation election among certain of the Petitioner's employees to determine whether or not the Union should be certified as their collective bargaining representative. An election date of February 8, 1974, was agreed to between the Petitioner and the Union. (R-3.)

The Union won the election by a narrow margin.[3]

On February 5, 1974, the President of the Union mailed a letter (R-25) to Petitioner's employees (arriving through the mails at the employees' homes on either February 6 or February 7, 1974) stating that he (the Union President) would guarantee that the Petitioner's employees would never have to pay initiation fees. (R-25.) In addition to the letter, many employees testified that they had been promised a waiver of initiation fees by members of the official Union organizing committee if the Union were successful in winning the election. (R-5,8.) There is no provision in the Union's constitution or by-laws permitting any such waiver, but conversely there are specific provisions in the Union's constitution that require payment of initiation fees as a condition precedent to membership:

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[2] The Indianapolis Printing, Pressmens, Assistants, and Offset Workers Union Number 17 a/w International Printing and Graphic Communications Union AFL-CIO—an Intervenor in the case before the Seventh Circuit.

[3] Votes cast for the Union numbered 86; votes cast against it numbered 75, with 7 ballots challenged by the Union. (R-4.)

"Article II

Membership and Fees

"Section 1

"This Union shall be composed of Journeymen and Journeymen Assistants, their respective Apprentices and speciality workers and miscellaneous workers provided they are deemed acceptable by the Executive Board and have *signed the obligation and comply with the rules and regulations made by this Union.*

"Section 2

"No application for membership shall be considered until Initiation Fees have been paid to the Union, unless Initiation Fees are being deducted weekly under the check-off system.

"Section 3

"The Initiation Fee to become a member of this Union shall be equal to *one (1) full week's pay at the rate of the job classification that this future member is hired to perform. . . .*" (Emphasis added.) (R-64.)

* * *

"Article III

Membership

"Section 1

"Prospective members coming into this jurisdiction from places having no Union shall file with the Secretary-Treasurer written application for membership, stating where last employed, length of time worked in classification with address and place of present or prospective employment. *No application for membership shall be considered until all requirements of Article II of the Constitution have been adhered to.*" (Emphasis added.) (R-68.)

No application for membership shall be considered until initiation fees have been paid. (Article II, Section 2, and Article III, Section 1.) Moreover, the Union's by-laws state that the failure to pay initiation fees not only denies Union membership, but such initiation fees are collectible by civil action in a court of law in a suit initiated by the Union, with attorneys' fees assessed against the non-paying member:

* * *

"Article III

Membership

"Section 13

"*Initiation fees, membership dues, all assessments made in accordance with these By-Laws and the Constitution of this Local Union, and all fines or penalties levied, imposed or assessed in the Constitution and By-Laws of this Local Union, shall be and constitutes a debt owed by the individual member to the Indianapolis Printing Pressmen Union Local 17, and in addition to all other penalties provided for delinquency or non-payment of any said initiation fee, dues, assessments, fines, or penalties, may be recovered as a debt owed by the individual member to the Indianapolis Printing Pressmen Union Local 17 by a suit or action at law.* Such suit or legal action shall be brought in the name of the Local Union, and said *officers are empowered with right and authority to bring said action for and on behalf of the Local Union.* Each individual member of the Indianapolis Printing Pressmen Union Local 17 agrees that in such action so brought against him for nonpayment of any *initiation fees or penalties he shall also be liable for all costs of court in said proceedings, together with a reasonable attorney's fee in an amount fixed by the Court.*" (Emphasis added.) (R-69, 70.)

Also prior to the election, the Union distributed literature which represented to voters that "there will not be any fines that we do not vote to impose". (R-23.) Once again, there are express provisions in the Union's constitution and by-laws which state exactly to the contrary:

"Article V

Funds

* * *

"Section 16

"A member who shall fail to appear before the Union, or any of its authorized committees, when properly notified to do so, shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) *as recommended by the respective committees or the Union.*" (Emphasis added.) (R-71.)

Thus, a committee can impose a fine. It does not require a full Union membership vote.

The Union's constitution and by-laws must be and are filed with the United States Department of Labor pursuant to the Labor Management Reporting and Disclosure Act of 1959. (29 U.S.C. Section 401, *et seq.*)

The Board, after overruling Petitioner's objections to the conduct of the election, certified the results of the election. Then Petitioner refused to bargain with the Union in order to challenge the validity of the Board's certification through the unfair labor practice provisions of the Act.[4]

If the Petitioner's contention is correct—that the Union's misrepresentation of its constitution and by-laws precluded the

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[4] While the action of the Board in overruling the Petitioner's objection to conduct affecting the results of the election, and its subsequent certification of the Union, were not open to direct review under the Act, the Board's ruling is subject to challenge where, as here, a refusal to bargain is predicated upon the ground that the Union's misrepresentation interfered with the employees' free choice to refrain from Union activity as guaranteed by Section 7 (61 *Stat.* 140, as amended, 29 U.S.C. Section 157) and did not comport with the principle of a fair and free choice of bargaining representatives that is inherent in Section 9(c)(1) of the Act. (61 *Stat.* 143, as amended. 29 U.S.C. Section 159(c)(1).) *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 271-272, 275-276, (1973) and *N.L.R.B. v. Tampa Crown Distributors*, 272 F.2d 470 (5th Cir 1959).

holding of a fair and free election—then the Petitioner did not engage in a refusal to bargain in violation of Section 8(a)(5) of the National Labor Relations Act. (29 U.S.C. Section 158(a)(5).) *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 271-272 (1973).

REASONS FOR GRANTING THE WRIT.

1. *The Decision of the Seventh Circuit Conflicts With Decisions of Other Courts of Appeals*—Both the Fifth Circuit Court of Appeals in *S. H. Kress & Co., v. N.L.R.B.*, 430 F.2d 1234, 1239 (5th Cir. 1970), and the Ninth Circuit in *N.L.R.B. v. Winchell Processing Corp.*, 451 F.2d 306, 309-310 (9th Cir. 1971), have held that the misrepresentation by a union of its constitution and by-laws immediately before a Board conducted election, is sufficient reason to justify the court's denying a Board bargaining order.

In the instant case the Union misrepresented its constitution and by-laws immediately before a Board conducted election in two regards:

(a) Promising employees they would never be required to pay initiation fees to obtain Union membership when the Union's constitution and by-laws specifically make the payment of such initiation fees a mandatory condition precedent to membership; and

(b) Stating that Union members could only be fined by the Union as a whole when the Union's constitution and by-laws specifically provide that fines may be levied by a committee of the Union.

In regard to the latter misrepresentation, the Seventh Circuit found that there was, in fact, a misrepresentation of the Union's constitution and by-laws, but concluded that it did not warrant setting aside the election. (Appendix A, *infra*, pp. 8a to 9a.) This, standing alone, puts the Seventh Circuit in conflict with decisions of the Fifth and Ninth Circuits in *S. H. Kress Co., supra*, and *Winchell Processing Corp., supra*.

In regard to the first misrepresentation, concerning initiation fees, the Seventh Circuit attempts to distinguish this case on its facts from those in the Fifth and Ninth Circuits. The basis of the court's attempt to draw such a distinction is the argument that there really was no misrepresentation concerning the Union's waiver of initiation fees since the Union's constitution and by-laws are silent regarding the power to waive initiation fees. (Appendix A, *infra*, p. 7a.) But the provisions of the Union's constitution and by-laws, as set forth in the Statement of the Case, clearly provide that payment of initiation fees is a mandatory requirement to obtain membership. As the Seventh Circuit correctly pointed out, there is no provision giving the Union power to waive initiation fees. But, for the court to then jump to the conclusion that, therefore, there was no misrepresentation is to ignore the provisions of the Union's constitution and by-laws making payment of initiation fees a mandatory condition precedent to membership. In fact, initiation fees can be collected in a civil suit by the Union, with attorneys' fees against the non-paying member. If the constitution and by-laws require payment of initiation fees as a condition precedent to membership and the Union President states this is not a requirement, then this has to be a case of misrepresentation. It can be nothing else.

In summary, the Seventh Circuit, on the issue of the misrepresentation of initiation fees, attempts to distinguish the instant case from *S. H. Kress, supra,* and *Winchell Processing, supra,* on the ground there was no misrepresentation. On the issue of the fining of members, the court makes no attempt to distinguish the case, but concludes this misrepresentation was not sufficient to warrant the denial of a bargaining order. Yet, the facts show both were misrepresentations. By enforcing the Board's bargaining order, the Seventh Circuit is in direct conflict with the decisions of the Fifth Circuit in *S. H. Kress, supra,* and the Ninth Circuit in *Winchell Processing, supra,* where those circuit courts concluded that misrepresentation by a union of its constitution and by-laws *is* sufficient to warrant a denial of a bargaining order.

2. *The Court's Decision in this Case is Contrary to Federal Labor Policy as Set Forth in the Labor Management Reporting*

and Disclosure Act of 1959—Not only does the Seventh Circuit's decision establish a conflict in the Circuits, but it also violates the well-established rule that a Board bargaining order will not be enforced when to do so puts the court in the untenable position of contravening other areas of federal labor policy. *N.L.R.B. v. Mansion House Center Management*, 473 F.2d 471 (8th Cir. 1973). In the instant case, the federal labor policy involved is that set out in the Labor Management Reporting and Disclosure Act of 1959 (hereinafter abbreviated "LMRDA"). (29 U.S.C. Section 401, *et seq.*) In order to demonstrate how the enforcement of the Board's order would contravene the policy of the LMRDA, it is necessary to discuss briefly that Act and the legislative history behind its passage.

With the passage of the LMRDA of 1959, it became part of the federal labor policy to require unions to file with the Secretary of Labor copies of the union's financial statements, as well as copies of the union's constitution and by-laws. The LMRDA specifically requires that the intitiation fees charged new members be reported. (29 U.S.C. Section 431(a)(3).)[5] The purpose of requiring the union's constitution and by-laws to be filed was to correct those cases where the McClellan Committee found union officials had "perverted or ignored their own constitution and by-laws".[6] Thus it is clear from legislative history that the evil which Congress wanted to remedy was the evil of union officers failing to follow their own constitution and by-laws which purport to establish the permissible parameters of such officials' actions and statements. In order to ensure that such documents were followed, Congress enacted provisions in the LMRDA requiring that union constitution and by-laws be reported and filed with the Department of Labor:

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[5] The full text of 29 U.S.C. Section 431 appears in Appendix D to this Petition.

[6] From the Statement of Secretary of Labor, James P. Mitchell, before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, February 4, 1959, as reported in Congressional Record, Senate—February 4, 1959, p. 1565. 1959 *U.S. Cong. and Adm. News*, p. 2318.

"Section 201

"(a) Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the Secretary, together with a report . . . containing the following information:

* * *

"(3) the initiation fee or fees required from a new or transferred member. . . .

* * *

"(5) . . .Any change in the information required by this subsection shall be reported to the Secretary of Labor at the time the reporting labor organization files with the Secretary the annual financial report required by [Section 201(b)]." 29 U.S.C. Section 431.

The Act provides that the Local Union President and Treasurer are personally responsible for the filing of the reports and the contents thereof. (29 U.S.C. Sections 439(a), (b) and (d).)[7] In this case, it is the Local Union President, the one responsible for the filings, who misrepresented the constitution and by-laws (R-25.) Clearly, the federal labor policy embodied in the LMRDA is subverted unless the unions must abide by their respective constitution and by-laws, for it reduces the LMRDA to a mere perfunctory filing requirement. No one could seriously argue that Congress simply wanted the constitution and by-laws filed, but then would not require they be followed. Such an argument is ridiculous on its face.

Yet, in this case, the Seventh Circuit's enforcement of the bargaining order not only condones a Union's misrepresentation of its constitution and by-laws, but legitimatizes it and rewards the Union with bargaining rights for doing it. The Seventh Circuit, in its opinion, concludes that even if the Union's misrepresentation violated the evil the LMRDA sought to remedy, the court still would not deny the bargaining order:

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[7] The full text of 29 U.S.C. Section 439 appears in Appendix D to this Petition.

> "That Act, nevertheless, provides for criminal penalties and civil penalties for its violation. See 29 U.S.C. Sections 439 and 440. In light of this, we believe that enforcement of the LMRDA does not call for the additional 'drastic' remedy of union non-recognition." (Appendix A, *infra*, p. 9a.)

Yet, in the *Mansion House, supra,* case, the court refused to enforce a bargaining order when to do so would clearly contravene federal labor policy. In this regard the Eighth Circuit said:

> "In substance we hold the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices." 473 F.2d at 477.

Although in the *Mansion House, supra,* case, the labor policy involved was the prohibition of racial discrimination in employment, and in this case the federal labor policy involved is requiring the Union to follow their constitution and by-laws (29 U.S.C. Section 431(a), (b)), the result in such case should be the same—a denial of bargaining rights. To do otherwise wou'd not only condone a violation of federal labor policy, it would reward the Union for this violation. This is exactly the reason why the Eighth Circuit refused to enforce the Board's order in *Mansion House, supra.*

The Seventh Circuit's decision in this case has a substantial impact in the area of labor law since it puts the judicial process, as well as the Board's machinery, in the position of condoning, or more accurately, encouraging a course of conduct which is in direct conflict with portions of the LMRDA. The court's imprimatur is now indelibly stamped upon such conduct. Now one Circuit holds that a union may, during an organizational campaign, ignore and misrepresent its constitution and by-laws with impunity. Yet, nothing is more important to the employee than to know what those documents contain since they govern his day-to-day relationship with his union. Also, in many cases,

such clauses bear directly on his employment relationship. Yet, according to the Seventh Circuit, it is perfectly permissible to misrepresent the issue of initiation fees and fines, and presumably the issue of strike votes and reasons for dismissal from the union (which could mean loss of job), and any and all other aspects of the constitution and by-laws. But once the election is over, employees could find that they are governed by a completely different set of rules. If the Union doesn't have to tell the employees what is in their constitution and by-laws, at least they should not be allowed to misrepresent them to their future members. Notwithstanding the Seventh Circuit's statement that there are 'adequate civil and criminal penalties in the LMRDA, the obvious problem is that neither the employee nor the employer has any standing to enforce these remedies.

To refuse a bargaining order under the facts of this case would not mean employees would have lost their right to Union representation. A new election could be ordered, and the chief difference would be that this time, when the employee entered the voting booth, he or she would have a true picture of the Union's constitution and by-laws. At least the Union could no longer misrepresent its organizational structure to the very employees which would later be bound by that same structure.

Considering the fact that the denial of the bargaining order will have the effect of enforcing national labor law and policy, and that conversely, such denial will have no adverse affect on the rights of the employees to choose a bargaining agent, the balancing of the equities tips heavily toward the denial of the bargaining order.

CONCLUSION.

For the reasons stated, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 74-2029
WARNER PRESS, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INDIANAPOLIS PRINTING PRESSMEN, ASSISTANTS AND OFFSET WORKERS UNION NUMBER 17,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ARGUED SEPTEMBER 8, 1975—DECIDED OCTOBER 31, 1975

Before CASTLE, *Senior Circuit Judge*, SWYGERT and PELL, *Circuit Judges.*

CASTLE, *Senior Circuit Judge*. Warner Press, Inc. [the "Company"], petitions this court to review and set aside an order of the National Labor Relations Board directing it to bargain with the Indianapolis Printing Pressmen, Assistants and Offset Workers Union No. 17 [the "Union"]. The Board filed a cross-application for enforcement of its order and the Union intervened. The Company seeks to have an election, won by the

Union, set aside on the grounds that (1) the Union misrepresented its constitution and by-laws regarding its authority to waive initiation fees and its procedure for levying fines, and (2) that the Union's offer to waive initiation fees of the Company's employees violated the Supreme Court's pronouncement in *NLRB* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973). For the reasons set forth below, we enforce the Board's order.

I.

Warner Press, located in Anderson, Indiana, is an Indiana corporation engaged in the manufacture, sale, and distribution of religious printed matter and related products. In December of 1973, the Union filed a petition with the Board seeking a representation election among certain employees of the Company. The petition was granted and an election was scheduled for February 8, 1974.

By the middle of December 1973, the Union's organizational campaign at the Company was in full swing. Both the Union and the Company were saturating the employees with campaign literature. During the two weeks preceding the election, the Union twice stated that the initiation fees of those employees at the Company then employed would be unconditionally waived.[1]

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[1] A Union leaflet, postmarked January 28, 1974, stated:

> There will never be any initiation fees for us who now work at Warner Press.

A letter from the Union's president, dated February 5, 1974, and received by the Company's employees on February 6 and 7, stated:

> I, Robert D. Clements, do hereby undertake to guarantee that there will *never* be any initiation fees paid to Number 17 by employees of Warner Press who are on the Company Payroll at the time that the first Contract is signed.
>
> This guarantee is extended unconditionally to all employees who are in the bargaining unit. I make this guarantee in the name of Indianapolis Printing Pressmen, Assistants' [sic], and Offset Workers Union Number Seventeen.

In addition to these printed statements, numerous employees reported that they had been orally promised a waiver of initiation fees by members of the Union's organizing committee.

Also during this period the Union stated that "[t]here will not be any fines that we do not vote to impose."

The Union subsequently won the election and the Company thereupon filed objections to the conduct of the election. The Company claimed among other things, that the Union had misrepresented its constitution and by-laws and had unlawfully offered to waive the initiation fees of the Company's employees. These Union acts, it urged, unfairly influenced the vote and required the election be set aside.

The Acting Regional Director investigated the Company's charges and submitted a report to the Board recommending that all of the objections be overruled in their entirety. He was of the opinion that the Union's statements regarding the waiver of initiation fees did not "purport to be so much a representation or statement of fact as to the contents of the union's constitution and by-laws" but rather appeared "to be a guaranty that the recipient will not be required to pay initiation fees." While noting that nothing in the constitution and by-laws expressly "supported" the waiver, he pointed out that there was no evidence indicating the promised waiver would be dishonored by the Union. The Acting Regional Director also found that the alleged misrepresentation of the Union's fining procedure was insufficient grounds to warrant setting aside the election under *Hollywood Ceramics Company*, 140 N.L.R.B. 221 (1962), since the Company had "more than ample time to make further reply had it chosen to do so." He further recommended that the Company's objection that the Union's promise to waive the fees violated the *Savair* decision be overruled. He reasoned that the waiver was permissable under *Savair*, since it applied to all of the Company's employees and not just to those who joined the Union before the election.

The Board adopted these recommendations and certified the Union. In order to obtain judicial review of the Board's certification order, the Company refused to bargain with the Union, and unfair labor practice charges were brought against it. In the unfair labor practice proceedings before the Board, the Board's General Counsel moved for summary judgement. Because the

Company raised the same arguments before the Board that it had advanced in the representation proceedings, the Board granted the motion and ordered the Company to bargain. 215 N.L.R.B. No. 10 (Nov. 21, 1974). The Company thereupon sought review in this court.

II.

The Company's primary contention in this appeal before us is that the Union misrepresented two separate provisions of its constitution and by-laws. The Company asserts that either of these alleged misrepresentations requires us to deny enforcement of the Board's order and set aside the election. In the alternative, the Company argues that the misrepresentations, if not sufficient in themselves to set aside the election, nevertheless violate the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* (1970), and the Union should therefore be denied bargaining rights.

A.

The first alleged misrepresentation involves the Union's offer to waive initiation fees of the Company's employees. The Company points out that the Union's constitution and by-laws nowhere expressly authorize such a waiver but rather in fact require that all membership applications be accompanied by initiation fees. Thus, the Company concludes that the Union had no power to waive initiation fees and therefore misrepresented to the employees that it could.

In support of this contention, the Company relies primarily on two sections of the Union's constitution and by-laws. Section 2 of Article II states:

> No application for membership shall be considered until Initiation Fees have been paid to the Union, unless Initiation Fees are being deducted weekly under the check-off system.

And Section I of Article III provides in part:

> No application for membership shall be considered until all requirements of Article II of the Constitution have been adhered to.

Nowhere in the constitution and by-laws, however, is the Union expressly given or denied authority to waive the fees if it so desires.

The provisions relied upon by the Company, in our opinion, do not prohibit the Union from unilaterally waiving the initiation fees. Those provisions merely specify certain requirements for membership. In no way do they restrict the Union from modifying or waiving certain requirements. We cannot say that, when faced with an absence of express language in its governing documents on the point, a union may not choose to perform an act that is not prohibited by those documents.[2] To do so, we believe, would be interjecting ourselves into an internal union procedure.

It is elementary that for a misrepresentation to exist, there must be a false or misleading statement of a fact, or at least some distortion of the truth. *See NLRB* v. *Mr. Fine, Inc.*, 516 F. 2d 60, 61 n.1 (5th Cir. 1975). For this court to hold that the Board erred in not finding a misrepresentation here, the Union must have represented that its constitution and by-laws permitted it to waive the fees when in fact those documents provided otherwise. The record, however, discloses that the Union never mentioned or referred to its constitution and by-laws in its waiver statements nor do those documents conflict with the Union's statements.

Furthermore, the Company does not contend that the Union failed to fulfill its promise to waive the fees. The Union's statements, therefore, have not been demonstrated to be untrue or

[2] We do not agree with the Company's contention that the Union's constitution and by-laws "expressly forbid" the waiving of initiation fees. Our examination of the constitutional provisions included in the record discloses no such "express" prohibition. Implicit in the Company's argument is the assertion that since the constitution does not "expressly" *permit* waiver, it necessarily must "expressly" *forbid* waiver. We do not agree with this type of reasoning. For this to be true, the Union's constitution and by-laws must have been designed to create the Union as an organization of limited, enumerated powers. However, the portions of the Union's constitution presented in the record do not give rise to such a characterization. The Company has the burden here to demonstrate that the Union's constitution and by-laws make the Union a "creature" of enumerated powers. It has failed to carry that burden.

misleading. The Company promised to waive the fees and it apparently has fulfilled that promise.

The present situation differs from that before us in *NLRB* v. *Southern Health Corp.*, 514 F.2d 1121 (7th Cir. 1975). In that case Chief Judge Fairchild of this court concluded that the union had misrepresented its power to fine members by making the following statement:

> Mr. Ragland [the company president] stated in his letter to you of May 8 that the Union fined people for crossing a picket line. What Union was he talking about? *It was not this Union because under our Union Constitution we cannot fine anyone.* [Emphasis added.]

This statement was found to misrepresent the union's constitution because that document expressly provided for "fines" as one type of discipline available to the union.[3] The union had therefore represented that its constitution provided something which in fact it expressly provided to the contrary. In the present case, however, the Union neither referred to its constitution nor represented in any way that it provided something contrary to what it actually provided. Furthermore, unlike the situation in *Southern Health,* the Union's constitution and by-laws in the instant case are silent concerning its power to waive initiation fees.

Nor do the decisions in *S. H. Kress & Company* v. *NLRB,* 430 F.2d 1234 (5th Cir. 1970), and *NLRB* v. *Winchell Processing Company,* 451 F.2d 306 (9th Cir. 1971), mandate a different result. In *S. H. Kress,* the Fifth Circuit found a material misrepresentation in the union's statement that each member would receive $1000.00 in death benefits when in fact the union's constitution provided only that an amount "up to" $1000.00 would be received. Moreover, the constitution placed several contingencies on the receipt of the money which the union failed to disclose. 430 F.2d at 1237-38. In *Winchell Processing,* the union claimed that the bargaining unit would determine whether

[3] This court in *Southern Health* went on to hold that the Board did not abuse its discretion in determining that the misrepresentation concerning the union's constitutional power to fine did not have a significant impact on the election. 514 F.2d at 1124.

strikes occurred. The Ninth Circuit found such a claim misrepresented the union's constitution which expressly provided that the entire local, not merely the bargaining unit, voted on strikes. 451 F.2d 309-10.

Again, the distinction between these two decisions and the instant case is apparent. The courts in *S. H. Kress* and *Winchell Processing* were confronted by untrue and misleading claims directly contrary to *express* provisions in the unions' governing documents. In the instant case, we are not faced with a union contradicting or falsely stating a clear and *express* provision of its constitution and by-laws.

Therefore, since the Union's constitution and by-laws are silent regarding its power to waive initiation fees, and since there has been no showing (nor has the Company even contended) that the Union did not in fact fulfill its promise to waive the fees, we hold that the Board did not err in concluding that the Union did not misrepresent its constitution and by-laws in this instance.

The Company alleges a second misrepresentation of the Union's constitution and by-laws regarding its procedure for levying fines. The Company argues that the Union's statement in its January 28 leaflet that "[t]here will not be any fines that we do not vote to impose" misrepresented the "fines" provision of its constitution and by-laws. That provision, Section 16 of Article V, states:

> A member who shall fail to appear before the Union or any of its authorized committees, when properly notified to do so, shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) *as recommended by the respective committees or by the Union.* [Emphasis added.]

Therefore, unlike the waiver of initiation fees situation discussed above, the Union's statement here was made in the face of an express provision of the constitution and by-laws dealing with the question.

The Company argues that this provision does not provide that the membership vote on fines as the Union's statement represents but rather provides that a committee imposes fines. The Union,

on the other hand, contends that this section provides that a Union committee recommends fines with the ultimate decision remaining for the membership.

The test by which misrepresentations must be judged was set forth by this court in *Celanese Corporation* v. *NLRB*, 291 F.2d 224 (7th Cir. 1961). Only those misrepresentations which are material, made at a time which prevents effective reply, and are of a fact within the special knowledge of the party making it require an election be set aside. *Id.* at 226; *see also Hollywood Ceramics Company*, 140 N.L.R.B. 221, 223 (1962.)

Upon reading Section 16, we believe that it is open to reasonable interpretation. However, we need not decide whether the Union's proffered interpretation is reasonable for we agree with the Acting Regional Director's finding concerning this statement.[4] Even assuming, as he did, that the Union's statement is misleading, it was nevertheless made 11 days prior to the election. This afforded the Company more than ample time to effectively respond and offer its interpretation of the Union's fining

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[4] The Company points out that the Board misstated this finding of the Acting Regional Director in its unfair labor practice decision and order. The Board restated the Acting Regional Director's finding concerning the "fines" misrepresentation as follows:

> He [the Acting Regional Director] found that the Union had not misrepresented its constitution and by-laws with regard to fees and *dues*, but had merely guaranteed that they would be waived, as had traditionally been done and honored.

215 N.L.R.B. No. 10 at 3 (emphasis added). From this misstatement the Company argues that the Board "never even considered the Employer's objections based upon the fines issue." The Company fails to realize however that what is important is the Board's proper consideration of the "fines" misrepresentation issue in the representation proceedings earlier. There is no dispute that the Board properly considered and adopted the Acting Regional Director's findings at that time and stated so correctly in its representation decision. In the unfair labor practice proceeding before the Board, the entire record and the Acting Regional Director's report were before it and we must assume that the misstatement was merely a technical error in drafting. The subsequent misstatement in its unfair labor practice decision, we believe, does not require us to deny enforcement of the Board's order or to remand the case to the Board to correct its technical error in drafting its opinion.

procedure. Therefore, the Union's statement did not constitute grounds to set aside the election.[5]

B.

In connection with these alleged misrepresentations, the Company argues that the Union has violated the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* (1970) [the "LMRDA"], by misrepresenting its constitution and by-laws. Since we have found that the Union misrepresented the fining provision of its constitution and by-laws, we must address this question.

The LMRDA requires unions, among other things, to adopt a constitution and by-laws and to file copies with the Secretary of Labor. 29 U.S.C. §431. The Company argues that the purpose of this filing requirement is to assure that unions comply with their governing documents. The Union, it asserts, has violated the purpose of the LMRDA by misrepresenting its constitution and by-laws. The Company insists that the proper sanction for such a violation is to deny the Union bargaining rights.

A similar contention was before this court in *Schmerler Ford, Inc.* v. *NLRB*, 424 F.2d 1335, 1339-40 (7th Cir. 1970). In that case, Schmerler Ford maintained that the union's alleged violation of the federal antitrust laws mandated denial of bargaining rights. This court disagreed, stating that "[a]ntitrust enforcement does not call for the sweeping and drastic sanction of union nonrecognition." *Id.* at 1339.

Assuming, *arguendo*, that a union's misrepresentation of its constitution violates the LMRDA, that Act nevertheless provides both criminal penalties and civil remedies for its violation. *See* 29 U.S.C. §§ 439 & 440. In light of this, we believe that enforcement of the LMRDA does not call for the additional "drastic" remedy of union nonrecognition.

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[5] In so holding, we are not (as the Company contends that we are) ruling that "a union may, during an organizational campaign, ignore or misrepresent its constitution and by-laws with impunity." Rather, we are holding that a union's misrepresentation of its constitution and by-laws must be tested against the same standard as all other alleged misrepresentations.

The Company's reliance on *NLRB* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973), does not require a different result. There the court held that the Board could not participate in the maintenance of a union's racially discriminatory membership practices by granting it bargaining rights. We do not believe, however, that the interest in the instant case in assuring a union's compliance with its own constitution approaches in any way the interest in protecting federal constitutional rights that was before the *Mansion House* court. Furthermore, in *Mansion House* the court constructed what it believed to be an adequate remedy for the violation of constitutional rights since the fifth and fourteenth amendments did not themselves contain an adequate remedy. In the instant case, however, the LMRDA provides its own remedies which must be presumed to be adequate in absence of a showing to the contrary.

III.

The Company also argues that the Union's promise to waive initiation fees violated the Supreme Court's *Savair* decision. In *Savair* the Supreme Court held that an offer to waive initiation fees conditioned on an employee's joining the union *before* the election was coercive and unjustly allowed a union to "buy endorsements and paint a false portrait of employee support during its election campaign." 414 U.S. at 277. The Acting Regional Director found the waiver in the instant case to be unobjectionable because it was made available to all employees employed at the time the first contract was signed regardless of whether they joined the union before or after the election.

The Company, however, insists that the Court in *Savair* condemned *any* waiver made prior to an election regardless of whether it remained open to those who joined the union after the election. Any such waiver, it contends, interferes with the employees' free choice to refrain from union activity as guaranteed by section 7 of the National Labor Relations Act.

This is not a question of first impression in this circuit. Even before the Supreme Court's *Savair* decision, this court had occasion to address the issue of whether an unconditional waiver of

initiation fees for employees joining both before and after an election unfairly affected the outcome of the election. In *Macomb Pottery Company* v. *NLRB*, 376 F.2d 450, 454-55 (7th Cir. 1967), we held that it did not. An initiation fee waiver available to all employees regardless of when they joined the union was found to be unobjectionable because:

> [i]f the union won and a "contract is signed," the employee who voted against the union would have the same benefit (i.e., waiver of fee) as the employee who voted for the union. Any persuasive effect the promise of waiver may have on an individual employee in these circumstances is no different in kind from a statement of the amount of the dues or other representations of the advantages or burdens of membership. [*Id.* at 455.]

In a similar vein, the Supreme Court in *Savair* pointed out that a union's interest in waiving initiation fees was "legitimate" and could be

> preserved . . . by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after an election. [414 U.S. at 274 n.4.]

Subsequent to the *Savair* decision, several courts of appeals relied on this latter language in holding that an unconditional waiver is not coercive and therefore unobjectionable. *See NLRB* v. *Benner Glass Company*, 514 F.2d 641, 642 (5th Cir. 1975); *NLRB* v. *S&S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-13 (6th Cir. 1975); *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-50 (8th Cir. 1975); and *NLRB* v. *Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974) (dictum). Furthermore, in *Altman Camera Company* v. *NLRB*, 511 F.2d 319 (7th Cir. 1975), this court relied on this language in *Savair* to find an unconditional waiver of fees not to be an "improper inducement" of the employees. *Id.* at 322.

In light of these decisions, we find nothing in *Savair* to be inconsistent with our initial holding in *Macomb Pottery*. We therefore hold that the Acting Regional Director and the Board did

not err in finding that the Union's promised waiver in the instant case was lawful.

IV.

The Company requests that if we do not set aside the election, we at least remand this case to the Board for a hearing. We deny this request. As this court most recently stated:

> It is well established that in a refusal-to-bargain unfair labor practice proceeding there need be no evidentiary hearing to establish facts on which a certification is challenged if the company's objections have been adequately litigated and determined in the prior representation proceeding. [*NLRB* v. *Southern Health Corp.*, 514 F.2d 1121, 1125-26 (7th Cir. 1975).]

We believe the Company's objections in the instant case were "adequately litigated and determined in the prior representation proceeding." No remand, therefore, is necessary.

Accordingly, the Company's petition for review is denied and the Board's cross-application for enforcement is granted.[6]

ENFORCEMENT GRANTED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] We have examined the Board's order and have found it not to be "too broad" as the Company contends. "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts." *NLRB* v. *Thompson Express Publishing Company*, 312 U.S. 426, 436 (1941).

APPENDIX B

In the United States Court of Appeals For the Seventh Circuit

WARNER PRESS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 74-2029

JUDGMENT

Before: CASTLE, *Senior Circuit Judge*, SWYGERT and PELL, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition filed by Warner Press, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on November 21, 1974, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard arguments of respective counsel on September 8, 1975, and has considered the briefs and transcript of record filed in this cause. On October 31, 1975, the Court being fully advised in the premises, issued an Order granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is order and adjudged by the United States Court of Appeals for the Seventh Circuit that

the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

Senior Circuit Judge, United States
Court of Appeals for the Seventh Circuit

APPENDIX C

The pertinent parts of the National Labor Relations Act, 61 *Stat.* 136, as amended, (29 U.S.C. Secs. 151, *et seq.*) are as follows:

1. Section 8(a)(5), National Labor Relations Act (61 *Stat.* 140-141, as amended, 29 U.S.C. Sec. 158(a)(5)).
   "(a) It shall be an unfair labor practice for an employer—

   * * *

   (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

2. Section 7, National Labor Relations Act (61 *Stat.* 140, as amended, 29 U.S.C. Sec. 157).
   "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

3. Section 9(c)(1), National Labor Relations Act (61 *Stat.* 143, as amended, 29 U.S.C. Sec. 159(c)(1)).
   "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

   (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their em-

ployer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

APPENDIX D

The pertinents parts of the Labor Management Reporting and Disclosure Act of 1959 (73 *Stat.* 519, 29 U.S.C. Section 401, *et seq.*) are as follows:

1. Section 201, Labor Management Reporting and Disclosure Act of 1959 (73 *Stat.* 529, as amended, 29 U.S.C. Section 431):

"(a) Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information:

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this subchapter;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers

and stewards and of any representatives to other bodies composed of labor organizations' representatives with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b) of this section.

(b) Every labor organization shall file annually with the Secretary, a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year:

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

(c) Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendent, and costs of the action. Pub.L. 86-257, Title II, Sec. 201(a-c), Sept. 14, 1959, 73 Stat. 524.

2. Section 209, Labor Management Reporting and Disclosure Act of 1959 (73 *Stat.* 529, 29 U.S.C. 439):

"(a) Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this

subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false. Pub.L. 86-257, Title II, Sec. 209, Sept. 14, 1959, 73 Stat. 529.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-860

WARNER PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 525 F.2d 190. The decision and order of the National Labor Relations Board (J. A. 91-101)[1] are reported at 215 NLRB No. 10. The Board's decision in the underlying representation proceeding (J.A. 88-90) is unreported.

JURISDICTION

The decision of the court of appeals enforcing the Board's order was entered on October 31, 1975 (Pet.

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[1]"J.A." refers to the joint appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

App. 1a-12a).[2] The petition for a writ of certiorari was filed on December 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly rejected the Company's contention that, during a representation election campaign, the Union misrepresented its policy regarding initiation fees and its authority to fine members.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.),* are set forth at Pet. App. 15a-16a.

STATEMENT

The Union[3] filed a petition for an election among the Company's production and maintenance workers. The election was held, and the Union won by a vote of 86 to 75 (J.A. 3-4). The Company filed objections to the election, but the Board overruled the objections and certified the Union (J.A. 3-13, 88-90). The Company refused to bargain with the Union and, in the subsequent unfair labor practice proceeding, it reiterated its objections to the election. The Board found that the Company had violated Section 8(a)(5) and (1) of the Act by its refusal to bargain, and it issued a bar-

[2]The formal judgment submitted by the Board (Pet. App. 13a-14a) has not yet been entered, because, on November 19, 1975, petitioner obtained a stay pending the filing and disposition of the petition.

[3]Indianapolis Printing Pressman, Assistants and Offset Workers Union No. 17.

gaining order (J.A. 91-101). The court of appeals enforced the order.

During the election campaign, Union agents assured employees that the Union's customary initiation fee would not be required of employees currently working at the Company (J.A. 5-8). The Union also distributed several leaflets which stated that "[t]here will never be any initiation fees for us who now work at Warner Press" (J.A. 20, 23, 30). One leaflet explained that the Union "not only can waive initiation fees * * * but it already has"; that use of such waivers "for newly organized members is a long standing and perfectly legal policy of our Union"; and that "[s]uch fees have been waived all over the United States and Canada * * * and, they will be waived here at Warner Press too" (J.A. 30). In a letter sent to all employees three days before the election, the Union's president "guarantee[d] that there will *never* be any initiation fees paid to [the Union] by employees of Warner Press who are on the company Payroll at the time that the first Union Contract is signed" (J.A. 25; emphasis in original). The Company contended that the Union's pre-election promise to waive initiation fees was contrary to the Union's constitution, which provides for payment of an initiation fee and makes no express provision for its waiver (J.A. 9, 64).

Another Union leaflet, distributed eleven days before the election, assured the employees that "[t]here will not be any fines that we do not vote to impose" (J.A. 23). Pointing to a provision in the Union's bylaws which allows a committee of the Union—rather than the membership, as suggested in the leaflet—to impose a

fine on a nonappearing member, the Company contended that this leaflet misrepresented the procedures by which the Union imposed fines (J.A. 10-11).[4]

The Regional Director, whose findings the Board adopted rejected both of the Company's claims of misrepresentation. He pointed out that the offer to waive initiation fees was not a "statement of fact as to the contents of the union's constitution and by laws, but appears to be a guaranty that the recipient will not be required to pay initiation fees" (J.A. 9). He added that, while "this guarantee lacks support in the organizational constitution and by laws * * *, [s]uch waivers of financial obligations of a Union's constitution and by laws are traditionally made and traditionally honored and no evidence has been proferred that [the Union] will dishonor the waiver of initiation fees" (*ibid.*). The Director further found that the Union leaflet statement concerning fines was in response to "preceding Employer propaganda" (J.A. 10-11, 45) and "came at such a time in the campaign that the Employer had more than ample time to make further reply had it chosen to so do" (J.A. 11).

In enforcing the Board's order, the court of appeals held (Pet. App. 5a) that the provisions of the Union's constitution relied upon by the Company in support of its assertion that the waiver offer was a misrepresentation—

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[4]Article V, Section 16 of the by laws states (J.A. 71):

> A member who shall fail to appear before the Union, or any of its authorized committees, when properly notified to do so, shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) as recommended by the respective committees or by the Union.

> do not prohibit the Union from unilaterally waiving the initiation fees. Those provisions merely specify certain requirements for membership. In no way do they restrict the Union from modifying or waiving certain requirements. We cannot say that, when faced with an absence of express language in its governing documents on the point, a union may not choose to perform an act that is not prohibited by those documents.

With respect to the alleged misrepresentation concerning fines, the court relied upon the principle that (Pet. App. 8a) "[o]nly those misrepresentations which are material, made at a time which prevents effective reply, and are of a fact within the special knowledge of the party making it require an election be set aside." Since the Company had "more than ample time to effectively respond and offer its interpretation of the Union's fining procedure," the statement was not grounds for setting aside the election (*id.* at 8a-9a).

ARGUMENT

The question raised in the petition—whether a representation election should be set aside where immediately prior thereto a union misrepresented its constitution and bylaws (Pet. 2, 6-7)—is not presented on this record. Both the Board and the court of appeals rejected the Company's contention that the Union's offer to waive initiation fees was a misrepresentation and found that, even if the Union's statement concerning its fining power was misleading, the Company had ample opportunity to respond to the statement.[5] The only issue

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[5]Under settled principles, a misrepresentation that the other party has adequate opportunity to answer does not constitute grounds for setting aside an election. See *Celanese Corporation of America* v. *National Labor Relations Board*, 291 F.2d 224, 226 (C.A. 7); *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 223.

actually raised by the petition therefore is whether those determinations were correct. Such an issue raises only factual questions which do not warrant review by this Court.[6]

In any event, the Board's factual determinations are supported by substantial evidence and its conclusions are correct. The Company had well over a week to respond to the Union's statement concerning its fining powers, and the Company therefore could have corrected the possible misleading nature of the leaflet statement. Moreover, the Company offered no support for its assertion that the Union would not make good on its offer to waive initiation fees except its view that, since the Union's constitution did not expressly provide for such a waiver, it must be deemed to preclude one. The court of appeals properly rejected this assertion.[7]

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[6] *National Labor Relations Board* v. *Winchell Processing Corp.*, 451 F.2d 306 (C.A. 9), and *S.H. Kress & Co.* v. *National Labor Relations Board*, 430 F. 2d 1234 (C.A. 5), on which petitioner relies for its assertion of a conflict among the circuits (Pet. 7), are distinguishable. In both of those cases the courts found that the objectionable statements were actually misrepresentations, to which the employers had no opportunity to reply. *Winchell, supra*, 451 F.2d at 308-309; *S.H. Kress, supra*, 430 F.2d at 1238-1239.

[7] The court stated (Pet. App. 5a, n. 2):

> We do not agree with the Company's contention that the Union's constitution and by-laws "expressly forbid" the waiving of initiation fees. Our examination of the constitutional provisions included in the record discloses no such "express" prohibition. Implicit in the Company's argument is the assertion that since the constitution does not "expressly" *permit* waiver, it necessarily must "expressly" *forbid* waiver. We do not agree with this type of reasoning. For this to be true, the Union's

The Company's attempt to buttress its argument by reference to the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, 29 U.S.C. 401, *et seq.*, is wide of the mark. Even assuming, as the Company contends (Pet. 8-11), that the intent of the reporting provisions of that Act was to inform employees about the provisions of their Union's constitution, so that they could receive the benefits and protections accorded therein, it does not follow that the LMRDA was intended to prohibit a union from waiving, for the employees' benefit, obligations contained in its constitution.[8]

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constitution and by-laws must have been designed to create the Union as an organization of limited, enumerated powers. However, the portions of the Union's constitution presented in the record do not give rise to such a characterization. The Company has the burden here to demonstrate that the Union's constitution and by-laws make the Union a "creature" of enumerated powers. It has failed to carry that burden.

[8]Since, as shown, the Board's decision here does not contravene any federal policy, *National Labor Relations Board* v. *Mansion House Center Management Corp.* 473 F.29 471 (C.A. 8), upon which petitioner relies (Pet. 9), is inapposite. In *Mansion House*, there was a substantial claim that a Board bargaining order would have contravened the federal Constitution by aiding a union which maintained racially discriminatory membership practices. No comparable federal policy is implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
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FEBRUARY 1976.